85-1231

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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IN THE

SUPREME COURT OF THE UNITED STATES

Term, 1985

HELEN PASSARO,
Petitioner

vs.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals

for the Federal Circuit

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Petitioner, Helen Passaro, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Federal Circuit entered September 25, 1985, vacating a summary judgment entered in her favor by the United States Claims Court. Petitioner prays that on a hearing of this matter, the judgment of the Appeals Court be reversed, and the judgment of the Claims Court reinstated.

QUESTIONS PRESENTED

1. Does the Survivor Benefit Plan (SBP), P.L. 92-425, 10 U.S.C. §1447 et seq., require notification to a spouse of a retiree when the retiree elects not to participate in the plan at its maximum level?

2. Does the Claims Court have jurisdiction over a claim brought by the widow of a retiree for SBP benefits when the government fails to give the required spousal notice?

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OPINIONS BELOW

The opinion of the Court of Appeals is not yet reported (App.1).

The opinions of the Claims Court granting petitioner's motion for summary judgment are reported at 4 CL. CT. 395 and 5 CL. CT. 754 (App.29 and App.13)

JURISDICTION

The judgment of the Court of Appeals was entered on September 25, 1985. Timely Petition for Rehearing and Suggestion for Rehearing in Banc was filed, and was denied on November 18, 1985. This court has jurisdiction under 28 U.S.C. §12541(1).

STATUTORY PROVISIONS

The relevant portions of the Survivor Benefit Plan, P.L. 92-425, 10 U.S.C. §1447 et seq., are as follows:

1448(a) The Plan applies to a person who is married or has a dependent child when he becomes entitled to retired or retainer pay unless he elects not to participate in the Plan before the first day for which he is eligible for that pay. If a person who is married elects not to participate in the Plan at the maximum level, that person's spouse shall be notified of the decision.

Section 3(b) Any person who is entitled to retired or retainer pay on the effective date of this Act may elect to participate in the Survivor Benefit Plan established pursuant to clause (3) of the first section of this Act before the first anniversary of that date.

It is to be noted that Paragraph 1448(a) is part of clause (3) of the first section of the Act, referred to in Section 3(b) above.

The entire Act is set forth in the Appendix. (App.65)

STATEMENT OF THE CASE

Ramon Passaro was a member of the United States Army from September 15, 1948 until his retirement as a Major on November 1, 1968. Ramon Passaro married the plaintiff, Helen Passaro, on October 17, 1958. The U.S. Army was notified immediately of this marriage.

On September 21, 1972, the Survivor Benefit Plan was enacted as law, P.L. 92-425, 10 U.S.C. §1447 et seq.

On September 10, 1973, the Army received a form signed by Major Passaro wherein he elected not to participate in the SBP. After receiving this election, the Army made no attempt to notify the plaintiff, as the spouse of Major Passaro, that her husband had elected not to participate in the SBP.

Major Passaro died on October 7, 1976, leaving surviving him his widow and

dependent children. No benefits have been paid to the plaintiff by the defendant under the SBP.

On November 16, 1981, plaintiff filed a petition with the Claims Court seeking benefits at the maximum level allowable under the SBP. The basis for the jurisdiction of the Claims Court being the Tucter Act, 28 U.S.C. §31491. Cross motions for summary judgment were filed by the parties. On January 26, 1984, the Honorable Robert M. M. Seto, granted plaintiff's motion, finding that the provisions of the Survivor Benefit Plan required the Army to give notice to plaintiff upon the election by her husband not to participate in the plan. (App.29) After defendant filed a motion for reconsideration, the Claims Court reaffirmed that it had jurisdiction over the case and that the SBP required spousal notification. (App.13) Judgment was entered

in favor of plaintiff.

Defendant appealed the decision of the Claims Court to the United States Court of Appeals for the Federal Circuit. On September 25, 1985, a three judge panel of the Court vacated the judgment of the Claims Court and remanded the case with instructions to the lower court to dismiss the claim. (App.1)

Petitioner seeks a reversal of the order vacating the judgment of the Claims Court.

REASONS FOR GRANTING THE WRIT

1. The decision of a single panel of the Court of Appeals will deny benefits to thousands of families of military retirees.

2. The rights of military retirees and their families under the Survivor Benefit Plan are of great importance, but have never been addressed in this Court.

3. The decision of the Court of Appeals finding that the Claims Court has no jurisdiction over plaintiff's claim, not only denies plaintiff any remedy for governmental wrongdoing, but also is contrary to United States v. Testan, 424 U.S. 392 (1976).

4. The holding and scope of Testan should be clarified to specifically include pension claims in the jurisdiction of the Claims Court, such claims being specifically

excluded from the jurisidction of the U.S. District Courts. See 28 U.S.C. §1346(d).

5. The reliance which the Court of Appeals places on administrative interpretation of the SBP is contrary to the weight to be accorded it under Southeastern Community College v. Davis, 442 U.S. 397 (1979), and Teamsters v. Daniel, 439 U.S. 551 (1979).

Respectfully submitted,

Robert T. Seiwell
Attorney for Petitioner

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

HELEN PASSARO, Individually and as Executrix of the Estate of Ramon Passaro, Appellee,	:	
v.	:	Appeal 85-927
THE UNITED STATES, Appellant	:	

DECIDED: September 25, 1985

Before DAVIS, BENNETT, and BISSELL, Circuit Judges.

BENNETT, Circuit Judge.

The government appeals a judgment entered against it on October 23, 1984, by the United States Claims Court following its opinions in Passaro v. United States, 4 Cl. Ct. 395 (1984), and 5 Cl. Ct. 754 (1984). The judgment awarded the widow of a military retiree an accrued annuity and future benefits under the Armed Forces Survivor Benefit Plan, Pub. L. No. 92-425, 86 Stat.

706-713 (1972).[1] The appeal presents narrow but significant issues of Claims Court jursidiction and statutory interpretation. We vacate and remand.

The Survivor Benefit Plan (SBP) was enacted on September 21, 1972, to establish a new system of benefits for the survivors of military retirees, replacing the Retired Serviceman's Family Protection Plan (RSFPP). The latter, a self-financing program permitting a service member to provide a percentage of his retired pay as an annuity for his survivors, had proved inadequate, being invoked by only 15 percent of the eleigible military personnel.

The SBP employed a new concept which made automatic the rights of survivors of military members who retired on or after September 21, 1972, unless the member

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\1 All section references herein are to the 1972 Act.

affirmatively chose not to participate in the plan. If the member elected not to participate in the plan the statute required that his spouse be notified of the decision. Section 1448(a). This section also made an election not to participate in the plan irrevocable if not revoked before the date on which the member first became entitled to retired pay.

Major Ramon Passaro, appellee's husband, retired from the United States Army on November 1, 1968. He elected not to participate in the RSFPP, choosing instead to receive full retirement pay. Those who, like Major Passaro, had retired before the SBP became law were not, however, left out altogether. While it was provided in section 1455(3)(a) that the SBP applies "to any person who initially becomes entitled to retired or retainer pay on or after the effective date of this Act," it was further

provided in section 1455(3)(b) that "[a]ny person who is entitled to retired or retainer pay on the effective date of this Act may elect to participate in the Survivor Benefit Plan ... before the first anniversary of that date."

The Department of the Army contacted all service members who had previously retired and explained to them the benefits and procedures provided by the Survivor Benefit Plan. This was done on several occasions. A bulletin was first sent out describing the SBP. The bulletin was followed by a circular and then by a letter which included a form, which when filled out and returned would extend the benefits of the SBP to those who were already retired. A "final notice" provided a "box" to check on a postal card indicating the retiree's intention. Major Passaro received these communications and affirm-

atively elected not to participate in the SBP by checking the box indicating his intention. He signed and dated the card on September 4, 1973, which was within the then-existing time limit for a binding answer.

Four years after Major Passaro's death, his widow inquired about survivor benefits and was told by the Army that her husband had elected to receive his full retirement pay rather than to provide her with a survivor's annuity through reduced retirment pay. Her successful suit in the Claims Court and this appeal by the government followed.

II

The Claims Court agreed with Mrs. Passaro that the requirement that the spouse be notified of a nonelection of SBP benefits applies to service members who retired both before and after the effective date of the

1972 Act. The court, thus, assuming jurisdiction of a claim for money damages believed to be due, undertook to fashion an equitable remedy for Mrs. Passaro by deeming her late husband to be a memevber of the SBP. We think that the court exceeded its jurisdiction and misread the statute.

The Claims Court reached its judgment by writing into the Act a notice requirement it does not have. Congress knew how to say whether a spouse should be notified of a nonelection of survivor benefits by the military member. Section 1448(a) required notification but section 1455(3)(a) specified that it applied to "any person who initially becomes entitled to retired or retainer pay on or after the effective date of this Act." In other words, section 1448(a) applies to a service member who is automatically enrolled in the SBP because he retires on or after the

effective date of the Act, September 21, 1972. Section 1448(a) reads in pertinent part:

> a) The Plan applies to a person who is married or has a dependent child when he becomes entitled to retired or retainer pay unless he elects not to participate in the Plan before the first day for which he is eligible for that pay. If a person who is married elects not to participate in the Plan at the maximum level, that person's spouse shall be notified of the decision.

Thus, only a service member automatically enrolled by the Act could make an election not to participate before the first day for which he is eligible for retired or retainer pay. Those entitled to pay before September 21, 1972, were permitted by Congress to elect to participate rather than not to participate. The notice provision, therefore, does not apply to a service member who is already entitled to retired or retainer pay. No principle of statutory construction permits such a notice provision to be implied where it was

excluded by Congress.

Our views coincide with the administrative interpretation made and consistently applied in the 13 years since enactment of the SBA in 1972. Importantly, it agrees also with the intent of Congress which has amended the SBP five times and has never seen fit to alter the interpretation given administatively to the spousal notice provisions with respect to pre-SBP retirees.[2] This is persuassive evidence to support our interpretation of congressional intent in the matter. NLRB v. Bell Aerospace Co., 416 U.S. 267, 274-75 (1974).

The Claims Court has given weight to tangential remarks of two congressmen to support its interpretation of legislative history. We have carefully examined the

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\2 See Pub. L. No. 94-496, 90 Stat. 2375 (1976); Pub. L. No. 95-397, 92 Stat. 843 (1978); Pub. L. No. 96-406, 94 Stat. 1705 (1980); Pub. L. No. 97-35, 95 Stat. 383 (1981); Pub. L. No. 97-252, 96 Stat. 718 (1982).

entire legislative history including the statements alluded to and reach a contrary conclusion from the court below. There is no support for concluding that Congress meant to treat alike, for spousal notice purposes, those who retired both before and after enactment of the SBP. There is no statement in the hearing and congressional reports on this legislation suggesting that the United States would be liable to suit in money damages with respect to a claim by a widow of a pre-SBP retiree whose husband failed to enroll in the plan. Pertinent language of other committee members and the House and Senate Reports clearly difer-entiate between the pre-SBP retiree, and the service member yet to retire, on the points about spousal notice and election in and election out of the plan. Respectfully, the Claims Court has misread the record and the statute itself. We hold that the

administrative interpretation has been both reasonable and correct. The court should have taken a less expansive view of the claim by inquiring whether the administrative interpretation of the law was reasonable rather than whther it was the interpretation the court would have desired.

III

The judgment below was premised on jurisdiction which did not exist. It was held that the Tucker Act, 28 U.S.C. § 1491 (1982), provided the necessary jurisdiction here and reliance was placed on the holding in Barber v. United States, 676 F.2d 651 (Ct. Cl. 1982). That case does not help Mrs. Passaro. In Barber, the claimant was the widow of a service member who, unlike Mrs. Passaro's husband, retired after the enactment of the SBP and, therefore, was automatically enrolled in the plan. Sergeant Barber elected out of the plan on

the eve of his retirement and no notice was given to his spouse as required by the statute. The Court of Claims held that Mrs. Barber thus had a Tucker Act claim for money due under a substantive right created by the SBA statute, as clairified by legislative history. Here, however, only an affirmative decision by Major Passaro to participate in the plan would create a vested interest in his widow upon his death. The factual and legal situations in the two cases are obviously dissimilar. Absent a presently due money claim, therefore, the Claims Court had no jurisdiction in the present case to fashion what it described as equitable relief. Equity, to the extent that it can be administered by the Claims Court, exists as an incident of general jurisdiction under the Tucker Act when that Act is invoked, as it has been here. Pauley Petroleum, Inc. v. United States, 591 F.2d 1308, 1315-17 (Ct.

Cl. 1979), cert. denied, 444 U.S. 898 (1979).

We hold that nothing in the SBP statute expressly, or by implication, mandates that money damages are available as a remedy for the interpretation by the Army or other military departments that the SBP statute does not require notification of the spouses of pre-SBP retirees who failed or refused to participate in the plan.

CONCLUSION

The judgment of the Claims Court is vacated and the case is remanded to that court with the instruction that it dismiss this suit for lack of jurisdiction under the Tucker Act.

VACATED AND REMANDED

IN THE UNITED STATES CLAIMS COURT

No. 669-81C

(Filed: August 17, 1984)

HELEN PASSARO,	:	Military Pay; Survivor Benefit Plan; 10 U.S.C. §1448 (a), spousal right to notice; and equity jurisdiction
v.	:	
THE UNITED STATES	:	

Robert T. Seiwell, Media, Pennsylvania, for plaintiff.

Richard F. Silber, Washington, D.C., with whom is Acting Assistant Attorney General Richard K. Willard, for defendant, Major Thomas Bowe, Department of the Army, of counsel.

ON DEFENDANT'S MOTION
FOR RECONSIDERATION
OPINION

Seto, Judge.

This military pay case is currently before the court on defendant's motion for reconsideration of the court's previous opinion on cross motions for summary judgment. 4 Cl.Ct. 395 (1984) ("Passaro

I"). Defendant moves the court to reconsider its ruling that the court properly has jurisdiction of the case. The motion has been fully briefed by the parties, and oral arguments have been heard.

The facts of this case and the background of the relevant legislation are set forth more fully in Passaro I, which in turn relied heavily on the Court of Claims decision in Barber v. United States, 230 Ct. Cl. 287 (1982). Familiarity with both opinions is presumed, but, briefly, the facts are as follow: Congress passed the Armed Forces Survivor Benefit Plan Act, Pub.L. 92-425, 86 Stat. 706 et seq. (1972) ("the Act"), to remedy certain perceived deficiencies in the prior armed forces survivor annuity plan then in force. The Act created the Survivor Benefits Plan ("SBP" or "the Plan") (codified at 10 U.S.C. §§ 1447 - 1455). The SBP makes all service

personnel, upon retirement, automatic participants in a survivor annuity plan funded by deductions from the individual's retired pay.

Plaintiff's husband, Major Passaro, retired before the effective date of the Plan. Pursuant to section 3(b) of the Act (which was not subsequently codified), Major Passaro was entitled to participate in the Plan if he so elected within eighteen months of the effective date of the Act. Major Passaro affirmatively elected, by informing the Army in writing, to not participate in the Plan. Upon Major Passaro's death, plaintiff applied to the Army for benefits under the SBP. The Army refused payment, and plaintiff filed a complaint in this court.

Defendant contends that this court lacks jurisdiction because plaintiff's claim is not founded on any provision of the

Constitution or an Act of Congress which grants her a right to money damages against the United States. Alternatively, defendant argues that even if this court has jurisdiction, plaintiff has failed to state a claim upon which relief can be granted.

Plaintiff, relying on the provisions of the Act and on the decision in Barber, asserts that this court does have jurisdiction, inasmuch as the Army did violate an applicable Act of Congress by not notifying plaintiff of her husband's written election (not to participate), and that a remedy can be fashioned to correct the violation.

Both parties agree that there are no disputes as to material facts and that the issues are capable of disposition on summary judgment.

In the motion at bar, defendant contends that this court has improperly

exercised its equitable powers by, in effect, retroactively placing Major Passaro within the SBP. Defendant states that, prior to any such action in equity, the court must find a present claim for money damages. What defendant apparently ignores is both this court's earlier analysis of the Act, Passaro I, 4 Cl.Ct. at 400-401, and the ruling in Barber.

Defendant argues that the language of 10 U.S.C. § 1448 (a) (that section of the SBP mandating notification of the spouse in the event the retiree decides not to participate in the Plan), because it is phrased entirely in the present tense, e.g., "becomes," "elects," etc., does not apply to one who had already retired when the Act became effective. This argument completely ignores section 3(b) of the Act. This approach is entirely improper because "`"In expounding a statute, we must not be guided

by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy." United States v. Heirs of Boisdoree, 8 How. 113, 122 (1849); * * *.' Philbrook v. glodgett, 421 U.S. 707, 713 (1975)." Barber, 230 Ct. Cl. at 293. Pursuant to section 3(b) of the Act, Major Passaro was given an opportunity "to participate in the Survivor Benefit Plan established pursuant to clause (3) of the first section of this Act." The referenced clause of the first section of the Act contained the Plan in codified form. To adopt defendant's analysis of § 1448 (a) would render nugatory any meaning section 3 (b) of the Act may have, i.e., no person referred to by section 3(b) would later become entitled to retired pay, and thus, no person referred to by section 3(b) would be eligible to participate in the Act. Furthermore,

section 3(b) makes one in Major Passaro's position eligible under the entire Plan - there is no express limitation as to which sections of the Plan are applicable, rather, the whole Plan is referenced. This court will neither add words not found in the Congressional Act, nor excise a portion of the Act without express reason.

Having thus found that section 3(b) invokes all the provisions of the Plan, it is to those provisions that resort must be had to determine the effect of Major Passaro's election. Section 1448(a) clearly states: "If a person who is married elects not to participate in the Plan at the maximum level, that person's spouse shall be notified of the decision." (Emphasis supplied.) The parties have stipulated that Major Passaro did indeed make an election, that that election was to forego participation, and that plaintiff was not

notified of that election. Because this court is bound by decisions of the Court of Claims, it is bound to hold, as was held in Barber, that failure to notify the spouse was a violation of § 1448 (a). The Barber court held that this violation "can be fairly said to give rise to a claim for money damages." Barber, 230 Ct. Cl. at 291.

Having viewed the Act as a whole, rather than considering merely an isolated part thereof, the court finds that defendant's bases for objection are unpersuasive. This court holds that: (1) jurisdiction is proper, inasmuch as plaintiff bases her claim on an Act of Congress, 28 U.S.C. § 1491 (a) (1), viz., the Armed Forces Survivor Benefit Plan Act of 1972; and (2) plaintiff has stated a claim upon which relief can be granted because, by virtue of the Barber decision, the violation of the spousal notification

provision in § 1448 (a) gives rise to a claim for money damages.

Defendant avers, however, that money damages should not be awarded in this case because of the potentially large number of claims which may be filed. Defendant posits that approximately 800,000 individuals were eligible to join the SBP under section 3 of the Act. It is argued that this court's decision creates a cause of action for the survivors of those individuals, and the armed forces' consequent liability would be overwhelming. The argument is unpersuasive, as have been many of such "floodgate" arguments. The court has very carefully considered the applicable law, the applicable precedent, and the particular facts of this case, and will not speculate as to any result reached under differing circumstances.

Defendant additionally contends that

the court's decision is against the weight of other decisions by the Claims Court. Defendant relies on three cases: Harris v. United States, No. 715-83 (filed Jan. 31, 1984) [MARGOLIS, J.]; Anderson v. United States, No. 257-82C (filed May 31, 1984) (unpublished order); and Grayson v. United States, No. 292-82C (unpublished transcript of oral argument, April 11, 1984). None of the cases cited support defendant's position. Harris involved a motion for a preliminary injunction under 28 U.S.C. § 1491 (a)(2) enjoining plaintiff's discharge from the Air Force. The injunction was refused because the court lacked the equitable power to grant an injunction before entering a money judgment in plaintiff's favor. The case before this court does not involve a preliminary injunction. This court has found herein a violation of a statute which, because of the

binding effect of Barber, gives rise to a claim for money damages. This court has neither the power nor the inclination to overrule Barber, and considers Harris, which involves wholly different facts, to be clearly inapposite.

Defendant has attempted to place before this court the "undisputed facts" of the Anderson case, contending that the facts in Anderson are identical to those considered herein, and contending further that due consideration should be given the granting of defendant's motion for summary judgment in that case. The order filed in Anderson, which contains no underlying rationale, states only that defendant moved for summary judgment on plaintiff's claim and defendant's counterclaim, that plaintiff did not respond, and, on that basis, the court dismissed plaintiff's claim and defendant's counterclaim. This court will not, nor

should defendant, presume to guess the reasoning of the court in Anderson, but notes only that nothing contained in the one-page order is in any way persuasive to contend that the Anderson order constituted a decision on the merits, as opposed to one based solely upon procedure.

Defendant's third citation is to Grayson. This court has not been made aware of any filed decision or order in that case, but has been referred only to a transcript of oral arguments. This court has not been presented with the briefs filed in that case, and confesses to be at somewhat of a loss as to what precisely is to be learned from fragments of an oral presentation. What can be discerned is that the Grayson case concerned a claim under the SBP's predecessor plan, not under the SBP itself

as in Passaro I.[1] Grayson transcript at 7. As a result Grayson is clearly distinguishable from the instant case and, thus, is unpersuasive. Defendant herein acknowledges, but apparently wishes to ignore, this crucial difference. Moreover, this court believes that it is entirely inappropriate and improper to cite the comments of another court made in the midst of an argument between counsel. Such citation is to be condemned in the strongest terms. Defendant's counsel is expected to cite authority to this court, not out-of-context comments by another court considering an entirely different matter.

Having considered and rejected defendant's objections to this and the Barber decision, the court must now consider

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\1 Moreover, unlike Passaro I, there is no indication that the decedent in Grayson affirmatively notified the Armed Forces regarding his non-election into his retirement plan. Grayson transcript at 4-5.

the remedy to be fashioned as a consequence of the statutory violation. The court again finds Barber instructive. In Barber, the remedy granted was to award plaintiffs therein the "appropriate survivor benefits from the date of ... death ... until such time as they are no longer eligible therefor *** [and] that to the accrued total benefits to which plaintiffs are presently entitled there shall be offset that amount actually paid to [plaintiffs' decedent] during the period of his retirement that would otherwise have been deducted from his retirment pay as his contribution to the plan." Barber, 230 Ct. Cl. at 301.

In the case at bar, Major Passaro was never a member of the SBP. The court, however, following the dictates of the relevant legislation and the Barber decision, and finding therefrom a valid claim for money damages, may now fashion an

appropriate remedy pursuant to 28 U.S.C. § 1491 (a)(2), which states in part:

> To provide an entire remedy and to complete the relief afforded by the judgment, the court may, as an incident of and collateral to any such judgment, issue orders directing ... placement in appropriate duty or retirement status ....

The court need not go so far as to order that Major Passaro be retroactively placed in SBP. The appropriate remedy is to merely deem him a member of the plan, and calculate the amount of damages in accordance with the instructions in Barber.

CONCLUSION

Plaintiff has stated a claim within this court's jurisdiction, inasmuch as what was alleged was a violation of an Act of Congress - specifically, a violation of 10 U.S.C. § 1448 (a) made effective as to plaintiff and plaintiff's husband by section 3 of the Armed Forces Survivor Benefit Plan Act of 1972. According to established law,

such a violation gives rise to a claim for money damages. The parties have stipulated that the violation did occur, and the court therefore so finds.

It is therefore ORDERED that:

1. Plaintiff is entitled to recover accrued and future annuity benefits under the SBP in accordance with this opinion.

2. On or before September 28, 1984, the parties shall file a joint stipulation setting forth the amounts due plaintiff as calculated in accordance with this opinion. Upon receipt of the stipulation, this court shall enter judgment accordingly.

IT IS SO ORDERED.

S/
ROBERT M. M. SETO, J.

IN THE UNITED STATES CLAIMS COURT

No. 669-81 C

HELEN PASSARO, Individually and as Executrix of the Estate of RAMON PASSARO,	:	Military pay; Survivor Benefit Plan; 10 U.S.C. §
v.	:	1448(a), spousal right
THE UNITED STATES		to notice; and equity jurisdiction.

Robert T. Seiwell, Media, Pennsylvania, for plaintiff.

Richard F. Silber, Washington, D.C., with whom was Acting Assistant Attorney General Richard K. Willard, for defendant; Major Thomas G. Bowe, of the Department of the Army, of counsel.

ON CROSS MOTIONS FOR SUMMARY JUDGMENT

OPINION

SETO, Judge:

This military pay case is before the court on cross motions for summary judgment. Plaintiff petitions this court to find that the Survivor Benefit Plan (SBP), 10 U.S.C. §§ 1447-1455 (1976 & Supps.), entitles her

to an annuity, despite her deceased husband's election not to participate in the SBP. Plaintiff contends that § 1448 (a) of the SBP requires the Army to have notified her when her husband made his non- election, and that the Army's failure to have given her such notice entitles her to benefits under the SBP.

For the reasons stated below, this court holds that plaintiff was entitled to notification of her husband's election under § 1448 (a). Whether failure to comply with that section requires the Government to extend benefits to plaintiff under the SBP must be decided on the evidence to be adduced at trial. For the reasons set forth below, defendant's Motion for Summary Judgment is therefore denied, and plaintiff's Cross-Motion for Summary Judgment is denied in part and granted in part.

FACTS

On September 21, 1972, Congress enacted the Survivor Benefit Plan to establish a system of survivor benefits for the survivors of military retirees. S. Rep. No. 1809, 92d Cong., 2d Sess. 1, reprinted in [1972] U.S. Code Cong. & Ad. News 3288, 3289. Congress intended the SBP eventually to replace the self-financed Retired Serviceman's Family Protection Plan (RSFPP), 10 U.S.C. §§ 1431-1446, which, since its inception in 1953, proved inefficient because of increased expense and diminished participation. Among the SBP's provisions, Congress granted pre-SBP retirees the right to participate in the plan. 10 U.S.C. § 1455.

Major Ramon Passaro married the plaintiff, Helen Passaro, on October 17, 1958. He served on active duty in the United States Army for 20 years, 1 month and

15 days until his retirement on November 1, 1968. Major Passaaro elected not to participate in the RSFPP, choosing instead to receive full retirement pay.

Following the SBP's enactment in 1972, the Department of the Army mailed all retired service members a bulletin, which generally described the SBP. Retired Army Bulletin, DA Pamphlet 600-1 (October, 1972). In November 1972, the Army mailed all retirees a letter which further explained the SBP and the benefits available thereunder. The letter also included a form which would enable a retiree to elect to participate or refrain from participating in the SBP. Several months after this mailing, Major Passaro received at his address a postal card marked "Final Notice" which, again, would have allowed him to elect to participate in the SBP and, if he did not, would have provided a record establishing

his decision not to participate in the plan. Major Passaro elected not to participate in the SBP. He checked a box indicating his intention, signed the postal card, and dated it September 4, 1973. Major Passaro died on November 10, 1976.

Four years later, plaintiff wrote to the Army's Finance and Accounting Center, inquiring about survivor benefits. The Army informed her that her husband had elected to receive his full retirement pay rather than provide her a survivor's annuity through reduced retirement pay. Plaintiff thereafter filed her petition (now Complaint) with this court.

DISCUSSION

The SBP protects survivors of military personnel by automatically enrolling all retiring military personnel in the SBP.

The predecessor plan to the SBP was the Retired Serviceman's Family Protection Plan.

The RSFPP provided an annuity for the survivors of retired military personnel and was funded in part by amounts deducted from the retiree's retired or retainer pay. The old RSFPP required an affirmative election into the plan, i.e., participation was not automatic. The new SBP plan, on the other hand, provides a similar benefits package, but uses a revised procedure; to wit, a retiree is an automatic participant in the SBP unless he affirmatively elects out of the plan. The new procedure under the SBP provides further that in those cases where a married person decides to participate at less than the maximum level, or not to participate at all, such person's spouse must be notified of that decision. Section 1448, as codified, states in pertinent part:

> (a)
>
> (2) The Plan applies --
> (A) to a person ... who is married or has a dependent child when he

> becomes entitled to retainer pay, unless he elects not to participate in the Plan before the first day for which he is eligible for that pay....
>
> * * * *
>
> (3) (A) If a person ... who is married elects not to participate in the Plan at the maximum level ... that person's spouse shall be notified of that election.
> [Emphasis supplied.]

Only 15% of those retiring before enactment of the SBP participated in the RSFPP. In order to increase participation in the new SBP, Congress extended an option to elect into the SBP to those who retired before the SBP's enactment. This option is provided by section 3(b) of the Congressional act creating the SBP. Armed Forces Survivor Benefit Act, Pub. L. 92-425, 86 Stat. 706 et seq. (1972) (codified at 10 U.S.C. §§ 1447-1455) (the "Act"). Section 3(b) is the only section directed exclusive-

ly to pre-SBP retirees, and states:

> Any person who is entitled to retired or retainer pay on the effective date of this Act may elect to participate in the Survivor Benefit Plan established pursuant to clause (3) of the first section of this Act before the first anniversary of that date. [1]

The language of section 3(b) does not expressly include or exclude a spousal notice provision; therefore, determining whether spousal notice is mandated for section 3(b) elections requires construing the SBP statute and ascertaining Congress' intent. The issues this court must address are, therefore: first, whether Congress intended the spousal notice provision to apply to all retirees and, second, if such intent is found, whether the Government's

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\1 Congress later amended section 3 (b) to extend this period from twelve to eighteen months. Pub. L. 93-155, 87 Stat. 613, No. 804.

omissive violation of the notice provision mandates a retroactive election of plaintiff's deceased husband into the SBP.

Non-contractual actions, such as the case at bar, over which this court has jurisdiction generally fall into two categories subsumed under the Tucker Act, 28 U.S.C. §1491: (1) claims in which the plaintiff has paid money to the Government and seeks its return, or (2) claims in which plaintiff asserts an entitlement to money from the United States. Eastport S.S. Co. v. United States, 178 Ct. Cl. 599, 605, (1967). Plaintiff is not seeking the return of money, but asserts an entitlement to money. In providing entitlement to a monetary claim, plaintiff must indicate "the particular provision of law relied upon [that] grants [her], expressly or by implication, a right to be paid a certain sum." Eastport, 178 Ct. Cl. at 605.

Defendant asserts that the Supreme Court in United States v. Testan, 424 U.S. 392 (1976), defined this court's jurisdictional limits by requiring plaintiff to rely on a statute that expressly creates a cause of action for compensation or damages. By this narrow reading of Testan, however, defendant misconstrues this court's jurisdictional boundaries. The Court in Testan upheld the established principle that under 28 U.S.C. §1491, the plaintiff's "asserted entitlement to money damages depends upon whether any Federal statute 'can be fairly interpreted as mandating compensation by the Federal Government for the damage sustained.'" Testan, 424 U.S. at 400 citing Eastport, 178 Ct. Cl. at 607; and Mosca v. United States, 189 Ct. Cl. 283, 290, (1969). cert. denied, 399 U.S. 911 (1970). [Emphasis supplied.]

Furthermore, the Supreme Court has

decided a line of cases presenting situations in which Congress had created private rights, but neglected to expressly authorize the enforcement of those rights in the federal courts. See, e.g., Jackson Transit Authority v. Local 1285, Amalgamated Transit Union, 457 U.S. 15 (1982); California v. Sierra Club, 451 U.S. 287 (1981); Chrysler Corp. v. Redington, 441 U.S. 281 (1979); Cort v. Ash, 411 U.S. 66 (1975). [2] The

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\2 The significance of Cort v. Ash has been stated in Connelly v. United States, 1 Cl. Ct. 312, 554 F. Supp. 1250, rev'd in part on other grounds, No. 83-651 (Fed. Cir. Sept. 6, 1983), as follows:

> The Cort v. Ash line of cases points out the subtle but important distinction between Congressional intent to create a substantive entitlement and the intent to create a right to enforce that entitlement by suit in a federal court. . . . In determining whether suit may be brought under 28 U.S.C. §1491, the court must therefore be careful to determine not only whether Congress intended that the plaintiff be the beneficiary of an entitlement, but also whether it intended that he be able to enforce such entitlement by suit for money damages in this court. See United States v. Testan, 424

crucial factor in deciding whether a right of action may be inferred from a certain statute is whether Congress intended to create one. Touche Ross & Co. v. Redington, 442 U.S. 560, 575-76 (1979); Nat'l R. Passenger Corp. v. Nat'l Assn. of R. Passengers, 414 U.S. 453, 458, 460 (1974); Connolly v. United States, 1 Cl. Ct. 312, 554 F. Supp. 1250 (1982).

In Barber v. United States, 230 Ct. Cl. 287 (1982), the United States Court of Claims decided that Congress intended to create a substantive right to spousal notice when a retiree elects not to participate in the SBP. The court in Barber found the notice requirement in section 1448(a) to be "inextricably related to a serviceman's option to withdraw from plan coverage," Id. at 292, and that Congress intended the

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U.S. at 400-02, 96 S. Ct. at 954-955. [Connolly, 1 Cl. Ct. at 316 n. 5, 554 F. Supp. at 1254 n. 5.]

notice provision "to safeguard the rights of . . . [a retiree's] spouse." Id. at 298. Although all statutory violations do not give rise to monetary relief, Testan, 424 U.S. at 401, the Court of Claims found that "a violation of section 1448(a) can be fairly said to give rise to a claim for money damages." Barber, 230 Ct. Cl. at 291.

The facts in Barber, however, differ somewhat from those in the case at bar. In Barber, the plaintiff's husband retired after the SBP's enactment, and thus was an automatic participant in the plan. The Court of Claims found his attempt to elect out of the plan ineffectual until the Government met its obligation to notify the retiree's spouse. Barber, 230 Ct. Cl. at 298. Therefore, because the Government did not meet that obligation, the retiree remained an automatic participant and his spouse remained automatically entitled to

SBP benefits.

However, as a pre-SBP retiree, plaintiff's husband in the case at bar must have elected into the plan in order for his spouse to become a beneficiary thereunder. If this court determines that her husband's election not to participate in the SBP was ineffectual, plaintiff would still not be entitled automatically to SBP benefits. [3] Only an affirmative retroactive election of plaintiff's husband into the plan will give plaintiff a legal entitlement to SBP benefits.

Nevertheless, because this court has the power to employ equity procedures incidentally to granting monetary relief, Pauley Petroleum v. United States, 219 Ct.

\3 Voiding plaintiff's non-election into the SBP would still leave plaintiff's wife as she originally was, i.e., outside of the Survivor Benefit Plan. Therefore, unlike Barber, voiding the plaintiff's non-election alone would not resolve the asserted inequity.

Cl. 24, (1966), plaintiff's claim in the case at bar does not conflict with this court's jurisdiction. [4] This court has undertaken similar actions by ordering retroactive employment status in a position never held by a party for the purpose of awarding back pay, Chambers v. United States, 196 Ct. Cl. 186 (1971), and by reforming a deed or contract as a basis for awarding monetary relief. MacNamara Constr. of Manitoba v. United States, 206 Ct. Cl. 1, 4-5 (1975); Iowa-Wisconsin Bridge Co. v. United States, 114 Ct. Cl. 465, 504 (1949). cert. denied, 339 U.S. 982 (1950); see also

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\4 Pauley Petroleum; 219 Ct. Cl. 24, and its progeny are binding precedent upon this court, and empower this court to grant equitable relief incident to the granting of monetary relief. This court will continue to follow Pauley Petroleum, with full force and effect, unless and until modified by decisions of the United States Court of Appeals for the Federal Circuit or the United States Supreme Court. General Order No. 1, United States Claims Court (October 7, 1982) [KOZINSKI, C. J.].

United States v. Milliken Imprinting Co., 202 U.S. 168, 173-4 (1906).

The assumption that this court has no equity jurisdiction is an "ancient but inaccurate shibboleth." Quinault Attolle Ass's v. United States, 197 Ct. Cl. 134, 137-38 & n. 1 (1972). Although it cannot grant specific equitable relief, Quinault, 219 Ct. Cl. at 137-38 & n. 1, this court is empowered to employ equitable doctrines "incidentally to [its] general monetary jurisdiction either as equitable procedures to arrive at a money judgment . . .or as substantive principles on which to base an award of a money judgment." Pauley Petroleum, 219 Ct. Cl. at 38; see also Klamath & Modoc Tribes v. United States, 174 Ct. Cl. 483, 488, 490 (1966). Thus, following the Court of Claims' decision in Barber and the established principles governing the United States Claims Court's

jurisdiction, this court finds plaintiff's claim properly before it.

The next consideration is whether Congress intended the notice provision in section 1448(a) to apply to spouses of pre-SBP retirees. Defendant argues that because section 1448 of title 10, which sets forth the notice provision in the SBP, refers only to those retiring after the Act's effective date, Congress precluded the notice provision's application under section 3 of the Act which provides the right of pre-SBP retirees to elect into the SBP. Defendant's characterization of the Act is unwarranted.

This court recognizes that Congress passed the statute not in sections or parts, but as a complete package, "animated by one general purpose;" therefore, "each part or section should be construed in connection with every other part or section so as to

produce a harmonious whole," 2 C.Sutherland, Statutory Construction § 46.05 (4th ed. 1972); see Philbrook v. Glodgett, 421 U.S. 707, 713 (1975); Ass'n of Westinghouse Salaried Employees v. Westinghouse Elec. Corp., 348 U.S. 437, 443-44 (1955); Barber, 230 Ct. Cl. at 293; United States v. Calif. Portland Cement Co., 413 F.2d 161 (9th Cir. 1969).

In order to construe "each part or section" harmoniously "with every other part or section", it is incumbent upon this court to first analyze the entire Act as passed by Congress. The Act was passed with six sections, of which sections 2, 5 and 6 provide merely for renaming parts of the RSFPP and integrating the new Act into other titles. Section 4 deals with certain persons eligible for pensions under subchapter III of chapter 15 of title 38 of the United States Code or under the Veterans'

Pension Act of 1959. The sections here germane are sections 1 and 3. Section 1 contains three clauses: clause "(1)" provides for changing the then applicable name of chapter 73 of title 10; clause "(2)" provides for changes in sections correlative to the new additions; and clause "(3)" enacts the substance of the SBP via 10 U.S.C. §§ 1447-1455. Section 3 has subparts (a)-(f): "(f)" ensures that provisions relating to mental incompetency (§ 1449), recovery of erroneously paid funds (§ 1453), and administrative deficiency correction (§ 1454) are applied to section 3; "(e)" determines the effective date of the valid election; "(d)" defines the term "base amount" and is essentially the same as the definition in § 1447(2) of clause "(1)", with slight changes made to reflect the fact that § 1447(2) applies to automatic participants, while section 3(d) applies to

persons electing into the SBP; and "(c)" makes it clear that persons participating in the RSFPP may elect to remain in that plan.

The remaining two subparts of section 3 of the Act, when considered exclusively within the four corners of the Act, are logically included for the purpose of "tying up loose ends" created by the phasing in of the SBP and the concomitant phasing out of the RSFPP. Each subpart concerns a different class of servicemen and the options granted to each class. These subparts complete entirely the list of classes of servicemen to which the Act applies.

Section 1448 of the SBP concerns the other classes: § 1448(a) is the class consisting of service personnel not yet entitled to retirement or retainer pay when the Act was to take effect; "(b)" makes the SBP applicable to single personnel without

dependents; "(c)" speaks to persons on the temporary disability retired list; and "(d)" refers to a person who dies while on active duty. The element common to each of these classes is that everyone included was not yet, at the effective date of the Act, entitled to retired or retainer pay.

Subpart "(a)" of section 3 applies to those persons becoming eligible for retired or retainer pay on, or within 180 days after, the effective date of the Act. It reflects the phasing out of the RSFPP by cancelling any retirement pay options made prior to the Act under the RSFPP and mandating an election under SBP guidelines.[5]

The "phasing-out" provision of

\5 It should be noted that section 3(a)(1) and (a)(2) parallel the procedural aspects of § 1448 (a) and (b) in section 1, in that a person having a spouse and/or dependents is automatically within the SBP unless he affirmatively elects not to participate, while a single person without dependents must, if so desiring, affirmatively elect into the SBP.

subpart "(a)" of section 3 of the Act and the "phasing-in" provisions of §1448 of section 1 of the Act leave for consideration only one class -- those persons who had become entitled to retirement or retainer pay more than 180 days before the Act's effective date, including both those who had and those who had not been participants in the RSFPP. Subpart "(b)" allows one: (i) not participating in the RSFPP to affirmatively elect to participate in the SBP; or (ii) participating in the RSFPP to elect into the SBP and either (A) continue, within limits, to contribute to RSFPP funds, or (B) terminate participation in the RSFPP.

The effect, then, of subparts "(a)" and "(b)" of section 3 is to ensure that all service personnel are, or are permitted to be, assimilated into the SBP. The options for elections in the two subparts, were provided for a limited time (360 days in the

case of subpart "(a)" and eighteen months in the case of subpart "(b)"). After the designated time periods, the subparts would no longer be effective, nor would they need to be effective, since everyone on active duty would have come within one of the classes in § 1448 or would have already made an allowed election. It is entirely reasonable to assume that subparts "(a)" and "(b)" of section 3 were not included in section 1 simply because, after a certain time, these provisions would constitute mere statutory nullities, and , as such, could be excluded from the codified portion of the Act constituting the SBP, thereby avoiding excess verbage in the SBP's provisions.

This does not mean, however, that the provisions in 3(a) and 3(b) have nothing to do with the SBP itself. Obviously, those parts must have substance; that substance must be found in section 1 of the Act.

The express language of section 3(b) states that a person validly electing into the SBP "may elect to participate in the [SBP] established pursuant to clause (3) of the first section of this Act. . . ." To construe the Act as "a harmonious whole" would logically require reading section 1 exactly as written with a single change, viz., changing the word "becomes" in § 1448(a) and (b) to "is" or, perhaps, "has been." No other change is necessary to effectuate section 3(b)'s mandate.

The strict and detailed analysis just outlined, using only the very language of the Act, yields a construction which mandates spousal notice whenever a person in the class named in section 3(b) makes an election not to participate in the SBP. It is an ineluctable denouncement that section 3(b) cannot be considered in a vacuum, or it would be meaningless, having no substantive

provisions.

That this interpretation is correct is further buttressed by the direct reference to § 1448(a) in the last sentence of section 3(b). The logical inference to be deduced from the language and structure of the Act is that "(a)" and "(b)" of section 3 are not qualifying or merely supplementing provisions, but are instead integrating provisions bringing pre-SBP retirees within the Act's coverage. The court in Barber found, and this court agrees therewith, that § 1448 creates a substantive right. Barber, 230 Ct. Cl. at 292. The section cannot, therefore, be excluded from consideration through any process of selective incorporation. Section 3(b) incorporates all of clause (3) of section 1, not merely some perceived minimum necessary to implement a survivor annuity.

Moreover, statutory analysis,

however closely reasoned, is not the only underpinning for this court's holding. An overview of the SBP's legislative history reveals that Congress intended an interrelationship between section 1448(a) of title 10 and section 3(b) of the Act. The general purpose of the SBP was to:

> (1) Establish a new system of survivor benefits for survivors of present and future military retiress and active duty members who are retirement eligible; [and]
>
> (2) Provide a program guaranteeing a minimum annual income of $2,100 per year to current widows of military retirees. [S. Rep. No. 1089. 92d cong., 2d Sess. 1, reprinted in [1972] U.S. Code Cong. & Ad. News 3288, 3289.]
>
> (Emphasis added.)

Congress included the notice

provision in the SBP as an attempt to prevent the occurrence of widows learning after their spouse's death that their spouses had neglected to provide adequate support for them:

> [T]he Committee is concerned that in a relatively few cases survivors may unknowingly be left in a situation of great hardship because a retiree, for one reason or anther, did not join the program or otherwise provide an adequate annuity for his dependents.
>
> It is the intention of the Committe, therefore, that regulations designed to carry out this provision of the bill provide for counseling by competent officers for those about to retire who elect not to participate or elect to participate at less than the maximum level. It is further the intention of the Committee that the spouse of the member concerned will be present at the sounseling session if possible or provided separate counseling as necessary to be made fully aware of the options available and the election made by her husband. It is the intention of the Committe that in satisfaction of this requirement counseling officers shall certify, in the event the retiree elects not to participate or to participate at less than the maximum level, that counseling has been provided and shall present the spouse with a statement that specifies she has been counseled and indicates the counseling officer's satisfaction that she fully understands the implications of her husband's election. The spouse should be invited to sign the statement

indicating she has been counseled and understands the decision. The counseling officer should stand ready to provide any further information that the retiree or the spouse may require.

This new survivor annuity program makes a significant addition to the estate of the military retiree, and the Committee does not want a benefit of this magnitude lost to an individual service family through lack of awareness. It therefore wishes responsibility clearly placed on administrative officers to see that full counseling has been provided as to the effect on survivors of an election not to participate or to participate at a reduced level.

The rights in retirement pay accrue to the retiree and ultimately, the decision is his as to whether or not to leave part of that retirment pay as an annuity to his survivors. However, the Committee wants every effort made to be sure that the advantage is not lost through neglect or lack of understanding and that the spouse fully understands the election may profoundly affect her future welfare. [Barber v. United States, 230 Ct. Cl. 287, 296 (1982) (quoting H.R. Rep. No. 481, 92d Cong., 1st Sess. 8-9 (1972)]. [6] [Emphasis supplied.]

Thus it is manifectly clear that Congress intended to ensure that spouses of

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\6 The counseling provision that the Senalte Committe referred to in the statement above is required by Air Force Regulation 211-24, 717 (June 5, 1975).

present and future retirees would not bear the economic hardship experienced by widows under the RSFPP and, coincidentally, to abate existing financial problems among RSFPP widows. More important to the case at bar, however, is that Congress also intended to ensure that spouses of both pre-SBP and future retirees were treated equally under the plan. This concern is reflected not only in the Senate Committee statements, supra, but also in explicit statements evincing Congress' intent that the rules relating to participation for present and future retiress be interpreted consistently:

> The provisions in [the SBP] which allow current retirees to obtain coverage under the proposed plan have been clarified to assure that the rules for their participation are consistent with the rules for participation established for the future retirees. Again, the committee believed that this was the intent of S. 3905 when it was originally written. These provisions clearly insure the attainment of that intent. [S. Rep. no. 1089, 92d Cong., 2d Sess. 29, reprinted in [1972] U.S. Code Cong. & ad. News 3288, 3304; see id. at 66, [1972] U.S. Code Cong. & Ad. News at 3328.]

Remarks from the bill's sponsers also support plaintiff's contention that Congress intended the notice requirement to benefit all retirees and their spouses. In describing the rights and protections afforded under the bill to pre-SBP retirees and their spouses, Representative Legget stated:

> All present retirees will have the option of joining the new program, remaining in the old program [the RSFPP], or participating in both, provided that they do not create a combined annuity that exceeds their full retired pay.
>
> * * * *
>
> A retiree may elect not to participate, but if he does so, his spouse will be notified of the fact by the GOvernment. [117 Cong. Rec. 37202 (1971)]. [Emphasis supplied.]

In reference to another section in the House version of the bill, Representative Gubser, the bill's chief sponsor, emphasized the importance of avoiding discrimination against retired personnel:

> I merely say that we should not

discriminate; we should make it apply to all persons whether on active duty or retired. . . . [117 Cong. Rec. 37199 (1971)]. [Emphasis supplied.]

Defendant is unable to cite any specific language in the legislative history evincing an intent by Congress to distinguish among the rights afforded to both pre-SBP and future retirees and their spouses. Furthermore, Congress emphasized repreatedly the cardinal importance of protecting the survivor interests of widows through the notification provision. [7] The Court of Claims also stressed that an election not to participate in the plan had to be made with the spouse "fully aware of the [decision's] implications", so that "both parties [had] the opportunity to

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\7 See H.R. Rep. No. 92-481, 92d Cong., 1st Sess. 8-9 (1972); 117 Cong. Rec. 37194 (1971) (remarks of Rep. Pike); 37197 (remarks of Rep. Hicks); 37200 (remarks of Rep. Clausen); 37201 (remarks of Rep. Whitehurst); 3720 (remarks of Rep. Young); 37207 remarks of Rep. White).

discuss and reconsider together the decision." Barber, 230 Ct. Cl. at 297-298; see H.R. Rep. No. 92-481, 92d Cong., 1st Sess. 9 (1972).

CONCLUSION

In view of the importance attached by the Court of Claims and by Congress to the rights granted under the SBP to spouses of military retirees, this court is constrained to find that Congress did not intend to create such a gross disparity between pre-SBP retirees and future retirees by denying spouses of the former the right to be notified of the consequences surrounding a decision that would affect their welfare so adversely, while mandating that the latter must be so notified. Therefore, this court finds that section 3(b) of the SBP incorporates the notice provision section 1448(a) of title 10, and, following the opinion in Barber, that a

retiree's election not to participate in the SBP has no effect until the government fulfills its ministerial duty to notify the retiree's spouse.

Furthermore, because individuals should not suffer for the dereliction of public officers, this court finds that, in a proper case, it may apply equitable procedures to retroactively elect a pre-SBP retiree into the plan in order to award his widow monetary compensation. Whether the case at bar presents such inequities as to require the court to exercise these procedures must be determined from the evidence adduced at trial.

Accordingly, defendant's Motion for

Summary Judgment is DENIED. Plaintiff's Cross-Motion for Summary Judgment is GRANTED IN PART and DENIED IN PART, in accordance with this Order.

IT IS SO ORDERED.

S/
Robert M. M. Seto
Judge

January 26, 1984

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

No. 85-927
669-81C

HELEN PASSARO, Individually and as Executrix of the Estate of Ramon Passaro,
Appellee,

vs.

THE UNITED STATES,
Appellant.

JUDGMENT

ON APPEAL from the UNITED STATES CLAIMS COURT.
This CAUSE having been heard and considered, it is ORDERED and ADJUDGED: VACATED AND REMANDED.

DATED September 25, 1985 ENTERED BY ORDER OF THE COURT

Francis X. Gindhart,
Clerk

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

HELEN PASSARO, ETC.,
Appellee,

v. No. 85-927

THE UNITED STATES,
Appellant

ORDER

A petition for rehearing and a suggestion for rehearing in banc having been filed in this case,

UPON CONSIDERATION THEREOF, it is Ordered by the court that the petition for rehearing be, and the same is hereby, Denied.

The suggestion for rehearing in banc is declined.

FOR THE COURT

Francis X. Gindhart,
Clerk

November 18, 1985
Date

Public Law 92-425

September 21, 1972
[H. R. 10670]

AN ACT

To amend chapter 73 of title 10, United States Code, to establish a Survivor Benefit Plan, and for other purposes.

Armed Forces.
Survivor Benefit Plan, establishment.
10 USC 1431.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That chapter 73 of title 10, United States Code, is amended as follows:

(1) The title of the chapter is amended by adding "; **SURVIVOR BENEFIT PLAN**" after "**PAY**", and by inserting the following after the revised title:

"Subchapter Sec.
"I. Retired Serviceman's Family Protection Plan.....1431
"II. Survivor Benefit Plan.....1447

"Subchapter I.—Retired Serviceman's Family Protection Plan".

(2) Subchapter I is amended as follows:

(A) Sections 1435, 1436, 1437, 1438, 1439, 1440, 1441, 1442, 1443 (a) and (c), 1445, and 1446 are each amended by striking out "chapter" wherever it appears and inserting in place thereof "subchapter".

70A Stat. 110; 82 Stat. 752.

(B) Section 1443 is repealed and the corresponding item in the subchapter analysis for that section is stricken.

Repeals.
70A Stat. 111.

(C) Section 1444(b) is repealed and the catchline and subchapter analysis item for section 1444 are each amended by striking out "reports to Congress;".

75 Stat. 811.

(3) The following new subchapter is added after section 1446:

"Subchapter II.—Survivor Benefit Plan

"Sec.
"1447. Definitions.
"1448. Application of Plan.
"1449. Mental incompetency of member.
"1450. Payment of annuity; beneficiaries.
"1451. Amount of annuity.
"1452. Reduction in retired or retainer pay.
"1453. Recovery of annuity erroneously paid.
"1454. Correction of administrative deficiencies.
"1455. Regulations.

"§ 1447. Definitions

"In this subchapter:

"(1) 'Plan' means the Survivor Benefit Plan established by this subchapter.

"(2) 'Base amount' means—

"(A) the amount of monthly retired or retainer pay to which a person—

"(i) was entitled when he became eligible for that pay; or

"(ii) later became entitled by being advanced on the retired list, performing active duty, or being transferred from the temporary disability retired list to the permanent disability retired list; or

"(B) any amount less than that described by clause (A) designated by that person on or before the first day for which he became eligible for retired or retainer pay, but not less than $300;

81 Stat. 662; 83 Stat. 847.

as increased from time to time under section 1401a of this title.

"(3) 'Widow' means the surviving wife of a person who, if not married to the person at the time he became eligible for retired or retainer pay—

"(A) was married to him for at least two years immediately before his death; or

"(B) is the mother of issue by that marriage.

"(4) 'Widower' means the surviving husband of a person who, if not married to the person at the time she became eligible for retired or retainer pay—

"(A) was married to her for at least two years immediately before her death; or

"(B) is the father of issue by that marriage.

"(5) 'Dependent child' means a person who is—

"(A) unmarried;

"(B)(i) under 18 years of age; (ii) at least 18, but under 22, years of age and pursuing a full-time course of study or training in a high school, trade school, technical or vocational institute, junior college, college, university, or comparable recognized educational institution; or (iii) incapable of supporting himself because of a mental or physical incapacity existing before his eighteenth birthday or incurred on or after that birthday, but before his twenty-second birthday, while pursuing such a full-time course of study or training; and

"(C) the child of a person to whom the Plan applies, including (i) an adopted child, and (ii) a stepchild, foster child, or recognized natural child who lived with that person in a regular parent-child relationship.

For the purpose of this clause, a child whose twenty-second birthday occurs before July 1 or after August 31 of a calendar year, and while he is regularly pursuing such a course of study or training, is considered to have become 22 years of age on the first day of July after that birthday. A child who is a student is considered not to have ceased to be a student during an interim between school years if the interim is not more than 150 days and if he shows to the satisfaction of the Secretary of Defense that he has a bona fide intention of continuing to pursue a course of study or training in the same or a different school during the school semester (or other period into which the school year is divided) immediately after the interim. Under this clause, a foster child, to qualify as the dependent child of a person to whom the Plan applies, must, at the time of the death of that person, also reside with, and receive over one-half of his support from, that person, and not be cared for under a social agency contract. The temporary absence of a foster child from the residence of that person, while he is a student as described in this clause, will not be considered to affect the residence of such a foster child. Foster child.

"§ 1448. Application of plan

"(a) The Plan applies to a person who is married or has a dependent child when he becomes entitled to retired or retainer pay unless he elects not to participate in the Plan before the first day for which he is eligible for that pay. If a person who is married elects not to participate in the Plan at the maximum level, that person's spouse shall be notified of the decision. An election not to participate in the Plan is irrevocable if not revoked before the date on which the person first becomes entitled to retired or retainer pay. However, a person who is not married when he becomes entitled to retired or retainer pay but who later marries, or acquires a dependent child, may elect to participate in the Plan but his election must be written, signed by him, and received by the Secretary concerned within one year after he marries, or acquires that dependent child. Such an election may not be revoked. His election is effective as of the first day of the month after his election is received by the Secretary concerned. Effective date.

"(b) A person who is not married and does not have a dependent

child when he becomes entitled to retired or retainer pay may elect to provide an annuity to a natural person with an insurable interest in that person.

"(c) The application of the Plan to a person whose name is on the temporary disability retired list terminates when his name is removed from that list and he is no longer entitled to retired pay.

"(d) If a member of an armed force dies on active duty after he has become entitled to retired or retainer pay, or after he has qualified for that pay except that he has not applied for or been granted that pay, and his spouse is eligible for dependency and indemnity compensation under section 411(a) of title 38 in an amount that is less than the annuity the spouse would have received under this subchapter if it had applied to the member when he died, the Secretary concerned shall pay to the spouse an annuity equal to the difference between that amount of compensation and 55 percent of the retired or retainer pay to which the otherwise eligible spouse described in section 1450 (a)(1) of this title would have been entitled if the member had been entitled to that pay based upon his years of active service when he died.

85 Stat. 660.

"§ 1449. Mental incompetency of member

"If a person to whom section 1448 of this title applies is determined to be mentally incompetent by medical officers of the armed force concerned or of the Veterans' Administration, or by a court of competent jurisdiction, any election described in the first sentence of subsection (a), or subsection (b), of section 1448 of this title may be made on behalf of that person by the Secretary concerned. If the person for whom the Secretary has made an election is later determined to be mentally competent by an authority named in the first sentence, he may, within 180 days after that determination revoke that election. Any deductions made from retired or retainer pay by reason of such an election will not be refunded.

"§ 1450. Payment of annuity: beneficiaries

"(a) Effective as of the first day after the death of a person to whom section 1448 of this title applies, a monthly annuity under section 1451 of this title shall be paid to—

"(1) the eligible widow or widower;

"(2) the surviving dependent children in equal shares, if the eligible widow or widower is dead, dies, or otherwise becomes ineligible under this section; or

"(3) the natural person designated under section 1448(b) of this title at the time the person to whom section 1448 applies became entitled to retired or retainer pay, if there is no eligible beneficiary under clause (1) or (2).

Termination.

"(b) An annuity payable to the beneficiary terminates effective as of the first day of the month in which eligibility is lost. An annuity for a widow or widower shall be paid to the widow or widower while the widow or widower is living or, if the widow or widower remarries before reaching age 60, until the widow or widower remarries. If the widow or widower remarries before reaching age 60 and that marriage is terminated by death, annulment, or divorce, payment of the annuity will be resumed effective as of the first day of the month in which the marriage is so terminated. However, if the widow or widower is also entitled to an annuity under this section based upon the marriage so terminated, the widow or widower may not receive both annuities but must elect which to receive.

"(c) If, upon the death of a person to whom section 1448 of this title applies, the widow or widower of that person is also entitled to compensation under section 411(a) of title 38, the widow or widower

may be paid an annuity under this section, but only in the amount that the annuity otherwise payable under this section would exceed that compensation.

Retired or retainer pay waiver.

"(d) If, upon the death of a person to whom section 1448 of this title applies, that person had in effect a waiver of his retired or retainer pay for the purposes of subchapter III of chapter 83 of title 5, an annuity under this section shall not be payable unless, in accordance with section 8339(i) of title 5, he notified the Civil Service Commission that he did not desire any spouse surviving him to receive an annuity under section 8341(b) of that title.

80 Stat. 564. 5 USC 8331.

Ante, p. 144.

Refunds.

"(e) If no annuity under this section is payable because of subsection (c), any amounts deducted from the retired or retainer pay of the deceased under section 1452 of this title shall be refunded to the widow or widower. If, because of subsection (c), the annuity payable is less than the amount established under section 1451 of this title, the annuity payable shall be recalculated under that section. The amount of the reduction in the retired or retainer pay required to provide that recalculated annuity shall be computed under section 1452 of this title, and the difference between the amount deducted prior to the computation of that recalculated annuity and the amount that would have been deducted on the basis of that recalculated annuity shall be refunded to the widow or widower.

"(f) An unmarried person who elects to provide an annuity to a person designated by him under subsection (a)(3), but who later marries or acquires a dependent child, may change that election and provide an annuity to his spouse or dependent child. A change of election under this subsection is subject to the rules with respect to execution, revocation, and effectiveness set forth in the last three sentences of section 1448(a) of this title.

Restriction.

"(g) Except as provided in section 1449 of this title or in subsection (f) of this section, an election under this section may not be changed or revoked.

"(h) Except as provided in section 1451 of this title, an annuity under this section is in addition to any other payment to which a person is entitled under any other provision of law. Such annuity shall be considered as income under laws administered by the Veterans' Administration.

"(i) An annuity under this section is not assignable or subject to execution, levy, attachment, garnishment, or other legal process.

"§ 1451. Amount of annuity

"(a) If the widow or widower is under age 62 or there is a dependent child, the monthly annuity payable to the widow, widower, or dependent child, under section 1450 of this title shall be equal to 55 percent of the base amount. However, when the widow has one dependent child, the monthly annuity shall be reduced by an amount equal to the mother's benefit, if any, to which the widow would be entitled under subchapter II of chapter 7 of title 42 based solely upon service by the person concerned as described in section 410(l)(1) of title 42 and calculated assuming that the person concerned lived to age 65. When the widow or widower reaches age 62, or there is no longer a dependent child, whichever occurs later, the monthly annuity shall be reduced by an amount equal to the amount of the survivor benefit, if any, to which the widow or widower would be entitled under subchapter II of chapter 7 of title 42 based solely upon service by the person concerned as described in section 410(l)(1) of title 42 and calculated assuming that the person concerned lived to age 65. For the purpose of the preceding sentence, a widow or widower shall be considered as entitled to a benefit under subchapter II of chapter 7 of title 42 even

Ante, p. 410.

70 Stat. 870; 74 Stat. 917.

though that benefit has been offset by deductions under section 403 of title 42 on account of work.

83 Stat. 1307; Ante, pp. 413-418. Monthly annuity.

"(b) The monthly annuity payable under section 1450(a)(3) of this title shall be 55 percent of the retired or retainer pay off the person who elected to provide that annuity after the reduction in that retired or retainer pay in accordance with section 1452(c) of this title.

Annuity increase. 81 Stat. 852; 85 Stat. 817.

"(c) Whenever retired or retainer pay is increased under section 1401a of this title, each annuity that is payable under this section, or section 1448(d) of this title, on the day before the effective day of that increase shall be increased at the same time by the same total percent. The amount of the increase shall be based on the monthly annuity payable before any reduction under section 1448(d) or 1450(c) of this title, or subsection (a) of this section.

"§ 1452. Reduction in retired or retainer pay

"(a) The retired or retainer pay of a person to whom section 1448 of this title applies who has a spouse, or who has a spouse and a dependent child, and who has not elected to provide an annuity to a person designated by him under section 1450(a)(3) of this title, or who had elected to provide such an annuity to such a person but has changed his election in favor of his spouse under section 1450(f) of this title, shall be reduced each month by an amount equall to 2½ percent of the first $300 of the base amount plus 10 percent of the remainder of the base amount. As long as there is an eligible spouse and a dependent child, that amount shall be increased by an amount prescribed under regulations of the Secretary of Defense.

"(b) The retired or retainer pay of a person to wihom section 1448 of this title applies who has a dependent child but does not have an eligible spouse, shall, as long as he has an eligible dependent child, be reduced by an amount prescribed under regulations off the Secretary of Defense.

"(c) The retired or retainer pay of a person who has elected to provide an annuity to a person designated by him under section 1450(a)(3) of this title shall be reduced by 10 percent plus 5 percent for each full 5 years the individual designated is younger than that person. However, the total reduction may not exceed 40 percent.

Limitation.

"(d) If a person who has elected to participate in the Plan has been awarded retired or retainer pay and is not entitled to that pay for any period, he must deposit in the Treasury the amount that would otherwise have been deducted from his pay for that period, except when he is called or ordered to active duty for a period off more than 30 days.

Waiver.

"(e) When a person who has elected to participate in the Plan waives his retired or retainer pay for the purposes of subchapter III of chapter 83 of title 5, he shall not be required to make the deposit otherwise required by subsection (d) as long as that waiver is in effect unless, in accordance with section 8339(i) of title 5, he has notified the Civil Service Commission that he does not desire any spouse surviving him to receive an annuity under section 8341(b) of title 5.

80 Stat. 564; 5 USC 8331. Ante, p. 144.

Refunds, restriction.

"(f) Except as provided in section 1450(e) of this title, a person is not entitled to any refunds of amounts deducted from retired or retainer pay under this section unless the amounts were deducted through administrative error.

"§ 1453. Recovery of annuity erroneously paid

"In addition to other methods of recovery provided by law, the Secretary concerned may authorize the recovery, by deduction from later payments to a person, of any amount erroneously paid to him under this subchapter. However, recovery is not required if, in the judgment

of the Secretary concerned and the Comptroller General, there has been no fault by the person to whom the amount was erroneously paid and recovery would be contrary to the purposes of this subchapter or against equity and good conscience.

"§ 1454. Correction of administrative deficiencies

"The Secretary concerned may, under regulations prescribed under section 1455 of this title, correct or revoke any election under this subchapter when he considers it necessary to correct an administrative error. Except when procured by fraud, a correction or revocation under this section is final and conclusive on all officers of the United States.

"§ 1455. Regulations

"The President shall prescribe regulations to carry out this subchapter. Those regulations shall, so far as practicable, be uniform for the armed forces, the National Oceanic and Atmospheric Administration, and the Public Health Service. Those regulations shall—

"(1) provide that, when the notification referred to in section 1448(a) of this title is required, the member and his spouse shall, before the date the member becomes entitled to retired or retainer pay, be informed of the elections available and the effects of such elections; and

"(2) establish procedures for depositing the amounts referred to in section 1452(d) of this title."

SEC. 2. The chapter analysis of subtitle A and the analysis of part II of subtitle A of title 10, United States Code, are each amended by amending the item relating to chapter 73 by adding "; Survivor Benefit Plan" after "Pay".

SEC. 3. (a) The Survivor Benefit Plan established pursuant to clause (3) of the first section of this Act applies to any person who initially becomes entitled to retired or retainer pay on or after the effective date of this Act. An election made before that date by such a person under section 1431 of title 10, United States Code, is canceled. However, a person who initially becomes entitled to retired or retainer pay within 180 days after the effective date of this Act may, within 180 days after becoming so entitled, elect—

(1) not to participate in such Survivor Benefit Plan if he is married or has a dependent child; or

(2) to participate in that Plan, if he is a person covered by section 1448(b) of title 10, United States Code.

(b) Any person who is entitled to retired or retainer pay on the effective date of this Act may elect to participate in the Survivor Benefit Plan established pursuant to clause (3) of the first section of this Act before the first anniversary of that date. However, such a person who is receiving retired or retainer pay reduced under section 1436(a) of title 10, United States Code, or who is depositing amounts under section 1438 of that title, may elect before the first anniversary of the effective date of this Act—

(1) to participate in the Plan and continue his participation under chapter 73 of that title as in effect on the day before the effective date of this Act, except that the total of the annuities elected may not exceed 100 percent of his retired or retainer pay; or

(2) to participate in the Plan and, notwithstanding section 1436(b) of that title, terminate his participation under chapter 73 of that title as in effect on the day before the effective date of this Act.

A person who elects under clause (2) of this subsection is not entitled to a refund of amounts previously deducted from his retired or retainer pay under chapter 73 of title 10, United States Code, as in effect on the day before the effective date of this Act, or any payments made thereunder on his behalf. A person who is not married or does not have a dependent child on the first anniversary of the effective date of this Act, but who later marries or acquires a dependent child, may elect to participate in the Plan under the fourth sentence of section 1448(a) of that title.

Ante, p. 706.

(c) Notwithstanding the provisions of the Survivor Benefit Plan established pursuant to clause (3) of the first section of this Act, and except as otherwise provided in this section, subchapter I of chapter 73 of title 10, United States Code (other than the last two sentences of section 1436(a), section 1443, and section 1444(b)), as in effect on the day before the effective date of this Act, shall continue to apply in the case of persons, and their beneficiaries, who have elected annuities under section 1431 or 1432 of that title and who have not elected under subsection (b)(2) of this section to participate in that Plan.

"Base amount."

(d) In this section, "base amount" means—

(1) the monthly retired or retainer pay to which a person—

(A) is entitled on the effective date of this Act; or

(B) later becomes entitled by being advanced on the retired list, performing active duty, or being transferred from the temporary disability retired list to the permanent disability retired list; or

(2) any amount less than that described in clause (1) designated by that person at the time he makes an election under subsection (a)(2) or (b) of this section, but not less than $300;

as increased from time to time under section 1401a of title 10, United States Code.

81 Stat. 652; 83 Stat. 837.

Effective date.

(e) An election made under subsection (a) or (b) of this section is effective on the date it is received by the Secretary concerned, as defined in section 101(5) of title 37, United States Code.

76 Stat. 451; 82 Stat. 1314.

Ante, pp. 708, 710, 711.

(f) Sections 1449, 1453, and 1454 of title 10, United States Code, as added by clause (3) of the first section of this Act, are applicable to persons covered by this section.

Annuity payments, eligibility.

SEC. 4. (a) A person—

(1) who, on the effective date of this Act is, or within one calendar year after that date becomes, a widow of a person who was entitled to retired or retainer pay when he died;

72 Stat. 1137; 81 Stat. 180, 38 USC 521, 38 USC 521 note.

(2) who is eligible for a pension under subchapter III of chapter 15 of title 38, United States Code, or section 9(b) of the Veterans' Pension Act of 1959 (73 Stat. 436); and

(3) whose annual income, as determined in establishing that eligibility, is less than $1,400;

shall be paid an annuity by the Secretary concerned unless she is eligible to receive an annuity under the Survivor Benefit Plan established pursuant to clause (3) of the first section of this Act. However, such a person who is the widow of a retired officer of the Public Health Service or the National Oceanic and Atmospheric Administration, and who would otherwise be eligible for an annuity under this section except that she does not qualify for the pension described in clause (2) of this subsection because the service of her deceased spouse is not considered active duty under section 101(21) of title 38, United States Code, is entitled to an annuity under this section.

72 Stat. 1108; 84 Stat. 1864.

(b) The annuity under subsection (a) of this section shall be in an amount which when added to the widow's income determined under

subsection (a)(3) of this section, plus the amount of any annuity being received under sections 1431–1436 of title 10, United States Code, but exclusive of a pension described in subsection (a)(2) of this section, equals $1,400 a year. In addition, the Secretary concerned shall pay to the widow, described in the last sentence of subsection (a) of this section, an amount equal to the pension she would otherwise have been eligible to receive under subchapter III of chapter 15 of title 38, United States Code, if the service of her deceased spouse was considered active duty under section 101(21) of that title.

Ante, p. 706.

72 Stat. 1137; 81 Stat. 180. 38 USC 531. 84 Stat. 1964. 70A Stat. 619; 73 Stat. 358.

SEC. 5. Section 3(a)(4) of the Act of August 10, 1956, chapter 1041, as amended (33 U.S.C. 857a(a)(5)), and section 221(a)(5) of the Public Health Service Act, as amended (42 U.S.C. 213a(a)(5)), are each amended to read as follows:

"Chapter 73. Retired Serviceman's Family Protection Plan: Survivor Benefit Plan."

SEC. 6. Title 38, United States Code, is amended as follows:

(1) Section 415(g)(M) is amended to read as follows:

84 Stat. 1584.

"(M) payments of annuities elected under subchapter I of chapter 73 of title 10."

(2) Section 303(17) is amended to read as follows:

"(17) payments of annuities elected under subchapter I of chapter 73 of title 10.".

Approved September 21, 1972.

Public Law 92-426

AN ACT

September 21, 1972
[H. R. 2]

To establish a Uniformed Services University of the Health Sciences and to provide scholarships to selected persons for education in medicine, dentistry, and other health professions, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Uniformed Services Health Professions Revitalization Act of 1972".

Uniformed Services Health Professions Revitalization Act of 1972.

SEC. 2. (a) Title 10, United States Code, is amended by adding the following new chapters after chapter 103:

78 Stat. 1084. 10 USC 2101.

"Chapter 104.—UNIFORMED SERVICES UNIVERSITY OF THE HEALTH SCIENCES

Sec.
2112. Establishment.
2113. Board of regents.
2114. Students: selection; status; obligation.
2115. Graduates: limitation on number electing to perform civilian Federal duty.
2116. Reports to Congress.
2117. Authorization for appropriations.

"§ 2112. Establishment

"(a) There is hereby authorized to be established within 25 miles of

No. 85-1231

Supreme Court, U.S.
FILED
APR 4 1986
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1985

HELEN PASSARO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-1231

HELEN PASSARO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the Armed Forces Survivor Benefit Plan Act, 10 U.S.C. 1447 *et seq.*, entitled her to notice of her husband's decision not to participate in the Survivor Benefit Plan. She also contends that the Claims Court had jurisdiction over her claim for benefits.

1. Petitioner's husband, Major Ramon Passaro, served in the United States Army from September 15, 1948 until his retirement on November 1, 1968. At that time, he elected not to participate in the Retired Serviceman's Family Protection Plan, choosing instead to receive full retired pay. Pet. App. 3; Pet. 6.

Subsequently, on September 21, 1972, Congress enacted the Armed Forces Survivor Benefit Plan Act, Pub. L. No. 92-425, 86 Stat. 706, 10 U.S.C. 1447 *et seq.* This Act creates

an annuity program for the survivors of servicemen known as the Survivor Benefit Plan (Plan). The Plan, which replaced the Retired Serviceman's Family Protection Plan, automatically covers the survivors of servicemen who retire on or after the effective date of the legislation (September 21, 1972) unless the serviceman affirmatively declines to participate in the Plan. 10 U.S.C. 1448(a). If the serviceman declines to participate, "that person's spouse shall be notified of that election." 10 U.S.C. 1448(a)(3)(A).

Section 3(b) of the Act also provided that a serviceman who was entitled to retired or retainer pay as of September 21, 1972 could elect to participate in the Plan provided that he exercised that right within the first anniversary of the effective date of the legislation. 86 Stat. 711; see 10 U.S.C. 1448 note. The Army notified Major Passaro of his options and, on September 4, 1973, he elected in writing not to participate in the Plan (Pet. App. 4-5). The Army did not inform petitioner of her husband's decision.

Major Passaro died on October 7, 1976 (Pet. 6). Four years later, petitioner inquired about survivor benefits. The Army informed her that her husband had elected to receive full retired pay rather than to provide her with a survivor's annuity through reduced retired pay (Pet. App. 5). On November 16, 1981, petitioner filed suit in the Claims Court, contending that she was entitled to an annuity at the maximum benefit level under the Plan despite her husband's decision not to participate. She argued that 10 U.S.C. 1448(a) required the Army to notify her of her husband's decision and that its failure to do so entitled her to benefits. See Pet. App. 29-30.

The Claims Court partially granted petitioner's motion for summary judgment (Pet. App. 29-52). It acknowledged that Section 3(b) does not contain a spousal notification provision but concluded that the Section implicitly incorporated the notification requirement of 10 U.S.C.

1448(a) (Pet. App. 36, 60). The court ruled that a retiree's election not to participate in the Plan has no effect until the government notified the retiree's spouse. The court also held that it could employ "equitable procedures to retroactively elect a pre-SBP retiree into the plan in order to award his widow monetary compensation," stating further that "[w]hether the case at bar presents such inequities as to require the court to exercise these procedures must be determined from the evidence adduced at trial." Pet. App. 61.

The government moved for reconsideration, contending that the Claims Court was without jurisdiction and, in the alternative, that petitioner had failed to state a claim upon which relief could be granted. The Claims Court held that petitioner had stated a claim within the court's jurisdiction and that she was entitled to recover accrued and future annuity benefits under the Plan. Pet. App. 13-28.[1]

The United States Court of Appeals for the Federal Circuit vacated the decision of the Claims Court and remanded the case with instructions to dismiss for lack of jurisdiction (Pet. App. 1-12). The court of appeals concluded that "[t]he Claims Court reached its judgment by writing into the Act a notice requirement it does not have" (*id.* at 6). The court of appeals also rejected the Claims Court's conclusion that it had equity jurisdiction, stating that "[a]bsent a presently due money claim, * * * the Claims Court had no jurisdiction in the present case to fashion what it described as equitable relief" (*id.* at 11).

2. The court of appeals' decision is correct. It does not conflict with any decision of this Court or any other court of appeals, and it presents no issue of sufficient importance to merit this Court's review.

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[1]The court failed to explain why a trial was no longer required to determine whether benefits should be awarded.

a. Petitioner errs in contending that the Army was required to notify her of her husband's decision against participation in the government annuity program. The Armed Forces Survivor Benefit Plan Act does not require the Army to notify spouses of pre-Plan retirees that the retiree has declined to exercise his option to participate in the Plan. The spousal notification provisions of 10 U.S.C. 1448(a), by their plain terms, apply only to the decisions of servicemen who retire after the effective date of the Act. Section 1448(a)'s spousal notification provisions demonstrate, as the court of appeals correctly held, that "Congress knew how to say whether a spouse should be notified of a nonelection of survivor benefits by the military member" (Pet. App. 6).[2]

Furthermore, nothing in the legislative history indicates that Congress intended to require notice to the spouses of pre-Plan retirees. Indeed, the opposite is true. Both the House and Senate reports point out that notice is required in cases where a serviceman about to retire elects against participation in the Plan. See H.R. Rep. 92-481, 92d Cong., 1st Sess. 8-9 (1971); S. Rep. 92-1089, 92d Cong., 2d Sess. 50-51 (1972). But neither report makes any mention of a notice requirement in discussing the provisions of the Act applicable to servicemen who retired prior to the effective date of the Act. See H.R. Rep. 92-481, *supra,* at 11-12; S. Rep. 92-1089, *supra,* at 56-57. Additionally, the Army adopted its policy concerning notice to spouses of pre-Plan retirees in 1972. Although Congress has amended the Act several times since then, Congress has never seen fit to change the notice requirements. Pet. App. 3. Accordingly, the court of appeals properly gave weight to the Army's

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[2]Likewise, there is no provision in the statute suggesting that the United States could be held liable in money damages for the Army's failure to notify a pre-Plan retiree's spouse of his decision not to participate in the Plan. See page 5, *infra*.

longstanding interpretation. See, *e.g.*, *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 275 (1974).[3]

b. Petitioner also challenges the court of appeals' holding that the Claims Court had no jurisdiction over her claim. She states (Pet. 9) that this result "not only denies [her] any remedy for governmental wrongdoing, but also is contrary to *United States* v. *Testan*, 424 U.S. 392 (1976)."

The court of appeals correctly recognized that the Claims Court has no jurisdiction in the absence of a statutory right to relief. The court of appeals' decision is completely consistent with *Testan*, which holds that a claimant may assert a claim for money damages in the Claims Court only if a federal statute " 'can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained.' " 424 U.S. at 400 (quoting *Eastport Steamship Corp.* v. *United States*, 372 F.2d 1002, 1009 (Ct. Cl. 1967)). As we have discussed above, the Act here cannot "fairly be interpreted" to provide a remedy to a pre-Plan retiree's spouse who was not informed of her husband's decision not to participate in the Plan.

Finally, it should be remembered that the "remedy" petitioner seeks is, in reality, a windfall. Petitioner's husband could have chosen to provide her with a survivor's annuity,

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[3]Petitioner argues (Pet. 10) that the decision below is contrary to *Southeastern Community College* v. *Davis*, 442 U.S. 397 (1979), and *International Brotherhood of Teamsters* v. *Daniel*, 439 U.S. 551 (1979). Presumably, petitioner is relying on the Court's statement in *Teamsters*, 439 U.S. at 566 n.20, later quoted in *Southeastern Community College*, 442 U.S. at 411, that the deference paid to an agency's interpretation is "constrained by our obligation to honor the clear meaning of a statute, as revealed by its language, purpose, and history." In this case, however, the Army's interpretation of the Plan is fully consistent with both the plain language and the legislative history of the statute.

but, if he had, his retired benefits would have been reduced. He chose instead to receive full retired pay. It seems likely that petitioner benefitted, at least indirectly, from that choice. Even if petitioner's husband had elected to participate in the Plan, however, there is absolutely nothing in the record to indicate that he would have participated at the maximum level. Yet petitioner now seeks the maximum annuity. Surely Congress did not intend that result.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

APRIL 1986

DOJ-1986-04